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*In the*

# Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

AMERICAN HOSPITAL ASSOCIATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF AMICUS CURIAE OF DAVID G. McLONE, M.D., PH.D., SIEGFRIED PUESCHEL, M.P.H., M.D., PH.D., MARGARET MAHON, R.N., M.S.N., LAWRENCE J. BRODEUR, J.D., IN SUPPORT OF PETITIONER, MARGARET M. HECKLER

*DENNIS J. HORAN
VICTOR G. ROSENBLUM
EDWARD R. GRANT
MAURA K. QUINLAN
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND
343 S. Dearborn St.
No. 1804
Chicago, Illinois 60604
(312) 786-9494

*Counsel for Amici*
*Counsel of Record

CHAS. P. YOUNG CHICAGO

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF AMICI | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 3 |
| I. INTRODUCTION | 3 |
| II. A PROHIBITION OF DISCRIMINATION IN THE DENIAL OF MEDICALLY INDICATED, BENEFICIAL TREATMENT TO HANDICAPPED INFANTS IS WARRANTED BY THE PLAIN STATUTORY LANGUAGE OF § 504 | 5 |
| A. The Court of Appeals Ignored Fundamental Principles of Statutory Construction in Restricting the Scope of § 504 | 5 |
| B. A Handicapped Infant Can Be An "Otherwise Qualified Handicapped Individual" And A Denial of Medically Indicated Treatment Is A Denial of Benefits Contrary to § 504 | 6 |
| C. The Regulations Require Equal Treatment, Not Affirmative Action, In the Medical Care of Handicapped Infants | 11 |
| III. THE LEGISLATIVE HISTORY COMPELS A BROAD APPLICATION OF § 504 TO PROSCRIBE THE DISCRIMINATORY TREATMENT OF HANDICAPPED INFANTS | 14 |
| A. The Legislative History Establishes That § 504 Is A Broad, Remedial Provision | 14 |
| B. The 1974 and 1978 Amendments Emphasize That The Rehabilitation Act Encompasses Handicapped Infants and Medical Services. | 20 |
| IV. THESE REGULATIONS ARE ENTITLED TO DEFERENCE BECAUSE CONGRESS DELEGATED SUBSTANTIAL AUTHORITY TO THE AGENCY | 23 |
| V. CONCLUSION | 29 |

## TABLE OF AUTHORITIES


| Cases | PAGE |
|---|---|
| *Alexander* v. *Choate*, 105 S.Ct. 712 (1985) | *passim* |
| *American Academy of Pediatrics* v. *Heckler*, 594 F.Supp. 69 (D.D.C. 1983) | 24 |
| *American Hospital Association* v. *Heckler*, 585 F.Supp. 541 (S.D.N.Y. 1984), *aff'd*, No. 84-6211 (2d Cir. Dec. 27, 1984) | 5 |
| *American Maritime Ass'n* v. *United States*, 766 F.2d 545 (D.C.Cir. 1985) | 23 |
| *Application of Cicero*, 101 Misc.2d 699, 421 N.Y.S.2d 965 (N.Y.Sup.Ct. 1979) | 13 |
| *Application of President and Directors of Georgetown College*, 331 F.2d 1000 (D.C.Cir.), *reh'g en banc denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1964) | 12 |
| *Chevron, U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984) | *passim* |
| *Commissioner of Social Services* v. *Catherine and Phillip Guatrone*, No. N-2029 (Bronx, N.Y. Fam.Ct., May 31, 1984) | 13 |
| *Consolidated Rail Corp.* v. *Darrone*, 104 S.Ct. 1248 (1984) | 6, 18, 28 |
| *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978), *subsequent opinion*, 393 N.W.2d 836 (1979) | 12 |
| *Dickerson* v. *New Banner Institute, Inc.*, 103 S.Ct. 986 (1983) | 26, 28 |
| *Doe* v. *New York University*, 666 F.2d 761 (2d Cir. 1981) | 7 |
| *Erlenbaugh* v. *United States*, 409 U.S. 239 (1972) | 26 |
| *In re Adam*, 9 Fam.L.Rep. 2121 (D.C.Super.Ct.Fam.Div. Nov. 22, 1982) | 12 |
| *In re CFB*, 497 S.W.2d 831 (Mo.App. 1973) | 13 |
| *In Re Green*, 448 Pa. 338, 292 A.2d 387 (1972), *after remand*, 452 Pa. 373, 307 A.2d 279 (1973) | 13 |
| *In re McNulty*, No. 9190 (Probate Ct. Essex Co., Mass., Feb. 15, 1978) | 13 |

PAGE

*In re Phillip B.*, 92 Cal.App.3d 796, 156 Cal.Rptr. 48, *cert. denied, Bothman* v. *Warren B.*, 445 U.S. 949 (1979), *Guardianship of Phillip B.*, 139 Cal.App.3d 407, 188 Cal.Rptr. 781 (1983) ..... 13

*In re Teague*, No. 104-212-81886 (Cir.Ct. Baltimore, Md., filed Dec. 4, 1974) ..... 13

*In re the Treatment and Care of Infant Doe*, No. GU 8204-004A (Monroe Co.Cir.Ct., April 12, 1982), *writ of mandamus dismissed sub nom., State ex rel. Infant Doe* v. *Baker*, No. 482 S 140 (Ind.Sup.Ct. May 27, 1982), *cert. denied, Doe* v. *Bloomington Hospital*, 104 S.Ct. 394 (1983) ..... 10

*Jefferson County Pharmaceutical Assn, Inc.* v. *Abbott Laboratories*, 103 S.Ct. 1011 (1983) ..... 5

*Jehovah's Witnesses* v. *King Co. Hosp.*, 278 F.Supp. 488 (W.D.Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968) ..... 12

*Landreth Timber Co.* v. *Landreth*, 105 S.Ct. 2297 (1985) 5

*Lau* v. *Nichols*, 414 U.S. 563 (1974) ..... 6, 28

*Maine Medical Center* v. *Houle*, No. 74-145 (Super.Ct. Cumberland Co., Me. Feb. 14, 1974) ..... 13

*Matter of Gregory S.*, 85 Misc.2d 846, 380 N.Y.S.2d 620 (1976) ..... 12

*Matter of Hamilton*, 657 S.W.2d 425 (Tenn.App. 1983) 12

*Matter of Jensen*, 54 Or.App. 1, 633 P.2d 1302 (1981). 12

*Mourning* v. *Family Publications Services, Inc.*, 411 U.S. 356 (1973) ..... 6

*Muhlenberg Hosp.* v. *Patterson*, 128 N.J.Super. 498, 320 A.2d 518 (1974) ..... 13

*NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600 (1971) 28

*North Dakota* v. *United States*, 103 S.Ct. 1095 (1983) .. 5, 28

*North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982) ..... 5, 6, 17, 23

*Oscar Mayer Co.* v. *Evans*, 441 U.S. 750 (1979) ..... 26

*People in Interest of D.L.E.*, 645 P.2d 271 (Colo. 1982). 12

*Prince* v. *Massachusetts*, 321 U.S. 158 (1944) ..... 12

*Red Lion Broadcasting* v. *FCC*, 395 U.S. 637 (1969) .. 22

PAGE

*SeaTrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980) ..... 22
*Sedima, S.P.R.L.* v. *Imrex Co.*, 105 S.Ct. 3275 (1985).. 6, 19
*Smith* v. *Robinson*, 104 S.Ct. 3457 (1984) ..... 8
*Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979) ..... 8, 11
*Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) ..... 13
*Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969) ..... 6
*Tooahnippah (Goombi)* v. *Hickel*, 397 U.S. 598 (1970) . 26
*United States* v. *Freeman*, 44 U.S. (3 How.) 556 (1845). 22
*United States* v. *Stewart*, 311 U.S. 60 (1940) ..... 22, 26
*United States* v. *University Hospital, State University of New York at Stony Brook*, 575 F.Supp. 607 (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144 (2d Cir. 1984) ..... *passim*
*Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) ..... 12
*Youngberg* v. *Romeo*, 457 U.S. 307 (1982) ..... 25, 26

**Legislative History**

S.Rep.No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373 ..... 4, 28
S.Rep.No. 890, 95th Cong. 2d Sess. (1978) ..... 22
S.Rep. No. 246, 98th Cong. 1st Sess. (1983), *reprinted in* [1984] U.S. Code Cong. & Ad. News 2918 ..... 19
*Medical Ethics: The Right to Survival (1974): Hearings Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare on the Existence of the Moral and Ethical Problems faced With the Agonizing Decisions of Life and Death*, 93d Cong. 2d Sess. (1974).. 18
117 Cong.Rec. 45945 (1971) ..... 17
117 Cong.Rec. 45974 (1971) ..... 14
118 Cong.Rec. 525-26 (1972) ..... 15, 17
118 Cong.Rec. 3723 (1972) ..... 16
118 Cong.Rec. 8399 (1972) ..... 17
118 Cong.Rec. 8894 (1972) ..... 17
118 Cong.Rec. 11797 (1972) ..... 17
118 Cong.Rec. 14244 (1972) ..... 15

| | PAGE |
|---|---|
| 118 Cong.Rec. 16371 (1972) | 17 |
| 118 Cong.Rec. 30680 (1972) | 15 |
| 118 Cong.Rec. 30681-82 (1972) | 16, 17 |
| 118 Cong.Rec. 30683 (1972) | 17 |
| 118 Cong.Rec. 32265 (1972) | 16 |
| 118 Cong.Rec. 32279 (1972) | 16 |
| 118 Cong.Rec. 32280 (1972) | 17 |
| 118 Cong.Rec. 32281 (1972) | 17 |
| 118 Cong.Rec. 32282 (1972) | 17 |
| 118 Cong.Rec. 32294 (1972) | 17 |
| 118 Cong.Rec. 32304 (1972) | 16 |
| 118 Cong.Rec. 32310 (1972) | 17 |
| 118 Cong.Rec. 35155 (1972) | 17 |
| 118 Cong.Rec. 35163 (1972) | 17 |
| 118 Cong.Rec. 35837 (1972) | 17 |
| 118 Cong.Rec. 37302 (1972) | 16, 17 |
| 119 Cong.Rec. 65 (1973) | 18 |
| 119 Cong.Rec. 635 (1973) | 17 |
| 119 Cong.Rec. 5862 (1973) | 18 |
| 119 Cong.Rec. 5873 (1973) | 18 |
| 119 Cong.Rec. 5880 (1973) | 18 |
| 119 Cong.Rec. 5900 (1973) | 16 |
| 119 Cong.Rec. 5915 (1973) | 16, 18 |
| 119 Cong.Rec. 6144-45 (1973) | 17, 18 |
| 119 Cong.Rec. 7114 (1973) | 17, 18 |
| 119 Cong.Rec. 7136 (1973) | 18 |
| 119 Cong.Rec. 7153 (1973) | 18 |
| 119 Cong.Rec. 9597 (1973) | 16 |
| 119 Cong.Rec. 10802 (1973) | 15 |
| 119 Cong.Rec. 18127 (1973) | 16, 18 |
| 119 Cong.Rec. 18137 (1973) | 16, 17 |
| 119 Cong.Rec. 24442 (1973) | 17 |
| 119 Cong.Rec. 24550 (1973) | 17 |
| 119 Cong.Rec. 24562 (1973) | 17, 18 |
| 119 Cong.Rec. 24569 (1973) | 18 |
| 119 Cong.Rec. 24570 (1973) | 16 |
| 119 Cong.Rec. 24571 (1973) | 18 |

PAGE

119 Cong.Rec. 24580-81 (1973) ..... 18
119 Cong.Rec. 24586-89 (1973) ..... 18
119 Cong.Rec. 29628 (1973) ..... 18
119 Cong.Rec. 29633 (1973) ..... 18
120 Cong.Rec. 30534 (1974) ..... 20
120 Cong.Rec. 30536 (1974) ..... 17
120 Cong.Rec. 34722 (1974) ..... 17
120 Cong.Rec. 34725 (1974) ..... 20
120 Cong.Rec. 35009 (1974) ..... 20
120 Cong.Rec. 35010 (1974) ..... 20
120 Cong.Rec. 35016 (1974) ..... 20
124 Cong.Rec. 30308 ..... 22

**Statutes and Regulations**

20 U.S.C. § 1681 (1982) ..... 21
29 U.S.C. § 706(7) (1982) ..... 3-4, 20
29 U.S.C. § 761a (1982) ..... 21
29 U.S.C. § 762(b)(11) (1982) ..... 21, 22
29 U.S.C. § 794 (1982) ..... *passim*
29 U.S.C. § 794(a)(b) (1982) ..... 21
29 U.S.C. § 794(a)(2) (1982) ..... 21
29 U.S.C. §796 (1982) ..... 21
29 U.S.C. § 796a (1982) ..... 21
42 U.S.C. § 2000d (1982) ..... *passim*
S.J. Res. 118, 93d Cong., 1st Sess., 119 Cong.Rec. 24442 (1973) ..... 17
45 C.F.R. §84.3(k)(4) (1977) ..... 8-9
45 C.F.R. § 84, Subpart G (1977) ..... 24
45 C.F.R. Pt. 84, App. A, Subpart F, ¶ 36 (1977) ... 23, 27
45 C.F.R. § 84.55(f)(1) (1984) ..... 5
41 Fed.Reg. 20296 (1976) ..... 24
41 Fed.Reg. 29548 (1976) ..... 24, 27
47 Fed.Reg. 26027 (1982) ..... 23
48 Fed.Reg. 9630 (1983) ..... 24
48 Fed.Reg. 30846 (1983) ..... 24, 27
49 Fed.Reg. 1622 (1984) (to be codified at 45 C.F.R. Pt. 84) ..... 8, 24, 25

PAGE

**Other Authorities**

Duff and Campbell, *Moral and Ethical Dilemmas in the Special Care Nursery*, 289 N.Eng.J.Med. 885 (1973) 18

Gerry, *The Civil Rights of Handicapped Infants: An Oklahoma Experiment*, 1 Issues in Law & Medicine 15 (1985) ..... 25

"Panel Told Defective Infants Are Allowed To Die," New York Times, June 12, 1974, p. 18, col. 3 .... 18

President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* (1983) ..... 8, 9, 10, 18

*Protection and Advocacy Agency of Hawaii* v. *Kapiolani Children's Hospital*, Health and Human Services Doc. No. 09-79-3158 (1980) ..... 27

Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 Stan.L.Rev. 213 (1975) ..... 13

R. Scotch, *From Good Will to Civil Rights* (1984) .... 14, 17

United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (Sept. 1983) ..... 10

United States Dept. of Education, National Institute of Handicapped Research, *Program Directory* (1985) 21

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## BRIEF AMICUS CURIAE OF DAVID G. McLONE, M.D., PH.D., SIEGFRIED PUESCHEL, M.P.H., M.D., PH.D., MARGARET MAHON, R.N., M.S.N., LAWRENCE J. BRODEUR, J.D., IN SUPPORT OF PETITIONER, MARGARET M. HECKLER

### INTEREST OF THE AMICI

Amici have independently worked to meet the needs of handicapped infants in their fields of law and medicine.

David McLone received his M.D. from the University of Michigan, and his Ph.D. in neuroanatomy from Northwestern University. He is currently Chairman of Pediatric Neurosurgery, Children's Memorial Hospital, Chicago, and Associate Professor of Surgery, Northwestern University Medical School.

Siegfried Pueschel received his M.D. from the Medical Academy, Duesseldorf, Germany, his Ph.D. in Psychology from the University of Rhode Island, and his M.P.H. from the Harvard School of Public Health. He is currently Director of the Child Development Center, Rhode Island Hospital, and Professor of Pediatrics, Brown University.

Margaret Mahon received her M.S.N. from the University of Pennsylvania. She is currently on the faculty of the University of Pennsylvania, where she specializes in children with chronic illnesses and is a Ph.D. candidate.

Lawrence J. Brodeur received his J.D. from Indiana University, Bloomington, Indiana. As a Monroe County, Indiana, Deputy Prosecuting Attorney, he was appointed Guardian Ad Litem for Infant Doe on April 15, 1982 to pursue an appeal from the court decision denying medical treatment.

## SUMMARY OF ARGUMENT

The Secretary of Health and Human Services, pursuant to the broad authority delegated to her by Congress under § 504 of the Rehabilitation Act of 1973, has promulgated regulations to prohibit the denial of beneficial medical treatment to handicapped newborns by hospitals receiving federal financial assistance. The court of appeals held that these regulations, because they affect medical decision-making, do not fall within the purview of § 504. This result contradicts the plain language of § 504, ignores relevant legislative and regulatory history, distorts the reality of the medical problems faced by handicapped infants, and frustrates the clear will of Congress to eliminate discrimination in federally funded programs.

Contrary to the court's holding, a handicapped infant can be "otherwise qualified" to receive medical services for purposes of § 504. In most cases, it can be clearly determined whether a particular infant will benefit from treatment and whether a denial of treatment would discriminate solely on the basis of handicap. Since hospitals commonly seek court approval for treatment upon infants, these regulations do not require "affirmative action."

The legislative history establishes that § 504 is a broad, remedial provision, and that there is no legislative intent contrary to these regulations. Discrimination against handicapped infants was not a public issue in 1973, although it is a contemporary form of the evils against which § 504 is directed. Moreover, in amendments to the Rehabilitation Act passed in

1978, Congress provided for the care and treatment of the same handicapped infants covered by these regulations.

In striking down these regulations, the court failed to give due deference to an agency charged with the administration of a statute. The Department of Health and Human Services and its predecessor agency have consistently applied § 504 to prohibit discrimination by health care providers, and to ensure appropriate levels of medical services to all handicapped individuals. Hence, HHS' efforts to bring § 504 to bear on instances of discrimination against handicapped infants ought to be given great deference, and upheld.

## I.
## INTRODUCTION

Section 504 of the Rehabilitation Act of 1973[1] enacts a simple yet powerful principle into federal law: federal funds may not be used to promote discrimination by a recipient of federal assistance against an "otherwise qualified handicapped individual."[2] Congress has directed the Secretary of the Depart-

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[1] No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulations may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794 (1982).

[2] Section 706(7) defines "handicapped individual":

(7)(A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual

*(footnote continued on next page)*

ment of Health and Human Services (HHS) to promulgate regulations to carry out the broad, remedial purposes of § 504. S.Rep. 93-1297, 93d Cong. 1st Sess.39-40, *reprinted in* [1974] U.S. Code Cong. & Adm. News 6373, 6390-91. This Court has recognized that "those charged with administering [§ 504] [have] substantial leeway to explore areas in which discrimination against the handicapped pose[s] particularly significant problems and to devise regulations to prohibit such discrimination." *Alexander* v. *Choate*, 105 S.Ct. 712, 722-23 n.24 (1985).

Acting under this authority, the Secretary promulgated regulations applying § 504 to discriminatory medical treatment decisions involving handicapped infants. The regulations state that health care providers receiving federal financial assistance may not withhold treatment or nourishment "solely on the basis of present or anticipated physical or mental impairments, from handicapped infants who, in spite

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*(footnote continued from preceding page)*

> who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.
>
> (B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(7) (1982).

of such impairments, will benefit medically from the treatment or nourishment." 45 C.F.R. § 84.55(f)(1) (1984).

The court of appeals held these regulations invalid, reasoning that Congress never intended for § 504 to apply to treatment decisions involving handicapped infants. In so holding, the court unduly restricted the broad, remedial scope of § 504. The court failed to take into account the plain language of § 504, the expressed intent of Congress to ensure adequate medical services for handicapped infants, the delegation of broad authority to HEW, and the consistent regulatory history under § 504. When these factors are properly considered, it is clear that the court's holding was in error and should be reversed.[3]

## II.

## A PROHIBITION OF DISCRIMINATION IN THE DENIAL OF MEDICALLY INDICATED, BENEFICIAL TREATMENT TO HANDICAPPED INFANTS IS WARRANTED BY THE PLAIN STATUTORY LANGUAGE OF § 504

### A. The Court of Appeals Ignored Fundamental Principles of Statutory Construction in Restricting the Scope of § 504

In determining the scope of § 504, the proper starting point is the language of the statute. *Landreth Timber Co.* v. *Landreth*, 105 S.Ct. 2297, 2301 (1985); *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 520 (1982). In the absence of a clearly expressed, contrary legislative intent, the plain language of § 504 controls its construction. *North Dakota* v. *United States*, 103 S.Ct. 1095, 1102-03 (1983); *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Laboratories*, 103 S.Ct. 1011, 1016 (1983).

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[3] The court of appeals did not publish its opinion, but based its decision on *United States* v. *University Hospital, State University of New York at Stony Brook*, 729 F.2d 144 (2d Cir. 1984). *American Hospital Association* v. *Heckler*, No. 84-6211 (2d Cir. Dec. 27, 1984). Accordingly, in this brief, references to the court's opinion are references to the opinion in *University Hospital*.

As a remedial statute, § 504 must be broadly construed in order to effectuate its purposes. *Sedima, S.P.R.L.* v. *Imrex Co.*, 105 S.Ct. 3275, 3286 (1985); *Consolidated Rail Corp.* v. *Darrone*, 104 S.Ct. 1248, 1255 (1984). As long as these regulations are reasonably related to the purpose of the enabling legislation—to protect handicapped persons from discrimination and the denial of benefits in federally assisted programs—they must be sustained. *Lau* v. *Nichols*, 414 U.S. 563, 571 (1974) (Stewart J., concurring); *Mourning* v. *Family Publications Services, Inc.*, 411 U.S. 356, 369 (1973); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-81 (1969).

Disregarding these fundamental principles of statutory construction, the court of appeals constricted the plain language of § 504, both in the scope of handicapped individuals protected and in the type of programs covered. The court failed to give priority to the plain statutory language of § 504. Rather, the court limited the scope of the plain language by its interpretation of the regulatory history, concluding that the regulations at issue are "flatly at odds" with the "limited view" of the scope of § 504 allegedly taken by the Department of Health, Education and Welfare (HEW). 729 F.2d. at 154. As demonstrated in Sec. IV of this brief, the court misread the regulatory history; an accurate reading establishes that HEW and HHS have consistently expressed a broad view of the scope of § 504. By giving this erroneous reading of the regulatory history priority over the plain statutory language, the court failed to adhere to the principle that the plain language controls unless contradicted by a clearly expressed, contrary legislative intent. *North Haven*, 456 U.S. at 522.

### B. A Handicapped Infant Can Be An "Otherwise Qualified Handicapped Individual" And A Denial of Medically Indicated Treatment Is A Denial of Benefits Contrary to § 504

By its plain language, § 504 prohibits discrimination, the exclusion of participation, and the denial of benefits solely by reason of handicap, against any "otherwise qualified handicapped individual" in federally assisted programs. The court of appeals held that the regulations at issue are invalid because

a handicapped infant in need of medical treatment is not "otherwise qualified" for purposes of § 504 and because medical treatment is not an activity covered by § 504. The court reasoned that the "otherwise qualified" criterion only applies to "static" programs such as employment, education and transportation, and not to "fluid" programs such as medical treatment. Relying on *Doe* v. *New York University*, 666 F.2d 761 (2d Cir. 1981), the court added that the "otherwise qualified" criterion applies "only where the individual's handicap is unrelated to, and thus improper to consideration of, the services in question;" since a handicapped infant's need for medical services often arises from the handicapping condition, such infants cannot be "otherwise qualified." 729 F.2d at 156. Finally, the court reasoned that since handicaps are often related to the medical condition it will "rarely, if ever, be possible to say that a particular decision [not to provide medical treatment] was discriminatory." *Id.* at 156-57. Thus, according to the court, the "fluidity" of medical decisionmaking, and the relationship between the infant's handicap and need for medical services, create such uncertainty regarding both qualification and discrimination that no case can fall within the scope of § 504.

In so holding, the court failed to properly apply the plain statutory language, and disregarded compelling evidence contrary to its own factual assumptions. The distinction between "static" and "fluid" programs is a creation of the court of appeals, not of Congress, and has no foundation in the plain language or the legislative history. *Cf. Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S.Ct. 2778, 2792 (1984). Similarly, there is no factual basis for the sweeping assumption that all medical treatment decisions for handicapped infants are so fluid and uncertain that it is impossible to determine that a particular infant is qualified for medical service or is being discriminated against in the denial of such services. Because the court assumed that the handicap and "the services" are always inextricably intertwined, it failed to distinguish between an untreatable handicap and a treatable medical condition for which an infant can be qualified.

Contrary to the court's holding, handicapped infants do meet the criteria for "otherwise qualified handicapped individual." This Court has stated that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979). "[A] person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs." *Id.* at n.6. Moreover, "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the Section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its program for the needs of the handicapped." *Alexander*, 105 S.Ct. at 720 n.19.

Based on these elements, handicapped newborns who require medical treatment can be "otherwise qualified." The Secretary has properly applied this criterion to the context of handicapped infants. As the Secretary stated in her brief below, "[i]n the context of a health care program, there are no qualifications other than the ability, despite handicap(s), to benefit from medical treatment. If a child's handicapping condition does not prevent him from benefitting from surgery to correct other problems, he must be considered 'otherwise qualified.'" Brief for the Defendant-Appellant Margaret Heckler 19, *American Hospital Association* v. *Heckler*, No. 84-6211 (2d Cir. Dec. 27, 1984).[4] *See also*, 49 Fed.Reg. 1636 (1984) (to be codified at 45 C.F.R. Pt. 84).[5]

That a handicapped infant can be "otherwise qualified" is demonstrated by the report of the President's Commission for

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[4] Respondents contend that § 504 does not encompass children. Based on the plain language of § 504, however, "individual" must be taken to encompass persons "of all ages." *Smith* v. *Robinson*, 104 S.Ct. 3457, 3472 (1984).

[5] From the beginning, HHS regulations have broadly defined "qualified" in a manner that encompasses handicapped newborns.

(k) 'Qualified handicapped person' means:. . .

*(footnote continued on next page)*

the Study of Ethical Problems in Medicine. The Commission's analysis of the issue divides infant treatment cases into three categories: (1) where treatment is available "that would clearly benefit the infant," (2) where "all treatment is expected to be futile," (3) where "the probable benefits to an infant from different choices are quite uncertain."[6] Although the court of appeals assumed that no clear distinctions can ever be made in the medical treatment of handicapped infants, so as to allow the conclusion that certain decisions may be discriminatory, 729 F.2d at 157, the Commission concluded that "the three situations need to be considered separately, since they demand differing responses." President's Commission at 217. The Commission acknowledged that surgery may leave such infants with permanent handicaps and that "the expectation of such handicaps" is often considered in deciding whether to treat. However, the Commission concluded "that a very restrictive standard is appropriate: such permanent handicaps justify a decision not to provide life-sustaining treatment only when they are so severe that continued treatment would not be a net benefit to the infant." *Id.* at 218.[7]

The Commission's report demonstrates that it *is* possible to know with certainty whether treatment will be "beneficial"

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> (4) With respect to *other services*, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

45 C.F.R. § 84.3(k)(4) (1977) (emphasis added).

[6] President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* 217 (1983) [President's Commission].

[7] The "benefit" is to be viewed "from the infant's own perspective," and excludes "consideration of the negative effects of an impaired child's life on other persons, including parents, siblings, and society." President's Commission at 219. The Commission specifically stated that "the handicaps of Down Syndrome . . . do not justify failing to provide medically proven treatment, such as surgical correction of a blocked intestinal tract." *Id.*

and, thus, whether nontreatment would be discriminatory.[8] Indeed, the Commission acknowledged that "most" cases will fall into the "clearly beneficial" or "futile" categories, and only a "smaller number" will raise hard questions of uncertainty. *Id.* at 218, 220.

Therefore, the court erred in holding that the relationship between the handicapping condition and the services in question makes § 504 inapplicable to any case involving medical treatment of handicapped infants. 729 F.2d at 156-57. The court failed to recognize that an infant's need for medical services may be totally unrelated to the handicapping condition. The court also failed to distinguish between an untreatable handicap, and a related, but separate, medical condition which is treatable.[9] In one case, there is no relation between the handicap and the service; in the second, the relationship in no way mitigates the infant's ability to benefit from the service.[10] In both cases, the infants are "otherwise qualified" to receive

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[8] In this regard, the U.S. Commission on Civil Rights has noted that "[w]hile occasional denials of routine medical care have been reported, a much more serious problem involves the apparent withholding of lifesaving medical treatment for individuals, frequently infants, solely because they are handicapped." U.S. Com. on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 35-36 (Sept. 1983). *See also, In re the Treatment and Care of Infant Doe*, No. GU 8204-004A (Monroe Co.Ind.Cir.Ct., Mem.Op., Apr. 12, 1982), *writ of mandamus dismissed sub nom. State ex rel. Infant Doe* v. *Baker*, No. 482 S 140 (Ind.Sup.Ct. May 27, 1982), *cert. denied, Doe* v. *Bloomington Hospital*, 104 S.Ct. 394 (1983).

[9] Respondents obscure this distinction by claiming that the Government itself does not apply § 504 when "a certain level of defect" is reached. Respondents' Brief In Opposition To Petition For Writ Of Certiorari at 29. But the "defect" which renders § 504 inapplicable is a medical one that renders medical treatment not "beneficial" within the plain language of § 504, not one that is untreated for nonmedical reasons.

[10] For example, infants with Down Syndrome are sometimes afflicted with an esophageal atresia. Although the Down Syndrome cannot be reversed, the atresia can be surgically corrected, and the infant is thus "otherwise qualified" to receive the surgery.

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medical treatment, and a failure to provide appropriate treatment is forbidden by the plain language of § 504.

Accordingly, the court of appeals erred when it held that handicapped infants are not "otherwise qualified' to receive medical treatment and that the failure to provide such treatment is not discriminatory. The failure to provide beneficial medical treatment to an infant solely because of a handicap or the expectation of future handicap meets every element of § 504, is reasonably related to the purposes of § 504, and is a proper subject for regulation under that section.

### C. The Regulations Require Equal Treatment, Not Affirmative Action, In the Medical Care of Handicapped Infants

Respondents additionally contend that these regulations are unauthorized under *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), because they mandate "affirmative action" by requiring health care providers to seek court review of parental refusal for treatment. In *Davis*, this Court held that "substantial" modification of an institution's programs amounts to affirmative action; unless there is "substantial" modification or "fundamental alteration," no affirmative action is involved. *Id.* at 411-12, *Alexander*, 105 S.Ct. at 721 n.20.

No modification, much less a substantial one, is required by these regulations. The regulations do not specifically require providers to treat infants in violation of parental consent or to seek judicial review. But hospitals in many cases already seek court orders to overrule parental refusal for medical treatment. If a hospital would ordinarily seek a state court order in the face of parental objection to administer medically indicated treatment to a nonhandicapped infant, to not seek such an order in the case of a

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*See* Brief Amicus Curiae of American Association on Mental Deficiency, et al.

handicapped infant, because the infant is handicapped, and to hide behind "parental responsibility," is to discriminate.[11]

Historically, physicians, hospitals, and state agencies have gone to court where parents refused medical treatment for nonhandicapped children.[12] Courts have ordered treatment for minors in numerous life-threatening situations.[13] In cases where there was no immediate threat to a child's life, some courts have ordered treatment,[14] while others have refused to order treatment, mainly because the proposed

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[11] This disposes of the District Court's objection that "University Hospital has failed to perform the surgical procedures in question, not because Baby Jane Doe is handicapped, but because her parents have refused to consent to such procedures." *University Hospital*, 575 F.Supp. at 614. This erroneously assumes that the hospital's obligation ends with the parent's refusal. If the hospital would seek to override the parental refusal of a Jehovah's Witness to allow a blood transfusion for his child, the hospital must also seek an override for medically indicated treatment for a handicapped infant. Parents have the ultimate responsibility *until* they neglect that responsibility. *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972), *Prince* v. *Massachusetts*, 321 U.S. 158, 166-67 (1944).

[12] For example, Jehovah's Witnesses cannot refuse a transfusion for a child, if such is needed to avoid substantial harm to the child. *Jehovah's Witnesses* v. *King Co. Hosp.* 278 F.Supp. 488 (W.D.Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968), *Application of President and Directors of Georgetown College*, 331 F.2d 1000 (D.C.Cir.), *reh. en banc denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1964).

[13] *Matter of Hamilton*, 657 S.W.2d 425 (Tenn.App. 1983) (12-year-old girl with Ewing's sarcoma), *People In interest of D.L.E.*, 645 P.2d 271 (Colo. 1982) (14 year old with gran mal epileptic condition), *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978) (*Green I*), 393 N.E.2d 836 (1979) (*Green II*) (leukemia).

[14] *In Re Adam*, 9 Fam.L.Rep. 2121 (D.C.Super.Ct.Fam.Div. Nov. 22, 1982), *Matter of Jensen*, 54 Or.App. 1, 633 P.2d 1302 (1981) (hydrocephalus), *Matter of Gregory S.*, 85 Misc.2d 846, 380 N.Y.S.2d 620 (1976).

treatment would not necessarily cure the medical condition.[15] This is merely consistent with deference to reasonable medical decisionmaking.

Courts have also ordered treatment for handicapped children.[16] Whether courts have or have not ordered treatment for handicapped persons, they have held that the intelligence or mental capacity of the individual is irrelevant.[17]

The regulations at issue are entirely consistent with this body of law. Since health care providers commonly seek judicial review, it cannot seriously be asserted that § 504 will "spawn" such litigation, 729 F.2d at 157, or that seeking court intervention is "affirmative action," since no "substantial" modification will be required in what health care providers have an independent duty to do. The "burden" of nondiscrimination does not constitute affirmative action.

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[15] *In re CFB*, 497 S.W.2d 831 (Mo.App. 1973) (psychiatric care), *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972), *after remand*, 452 Pa. 373, 307 A.2d 279 (1973).

[16] *Commissioner of Social Services* v. *Catherine and Phillip Guatrone*, No. N-2029 (Fam.Ct. of N.Y., Bronx, May 31, 1984) (Down Syndrome), *In re Phillip B.*, 92 Cal.App.3d 796, 156 Cal.Rptr. 48, *cert. denied, Bothman* v. *Warren, B.*, 445 U.S. 949 (1979), *Guardianship of Phillip B.*, 139 Cal.App.3d 407, 188 Cal. Rptr. 781 (1983), *Application of Cicero*, 101 Misc.2d 699, 421 N.Y.S.2d 965 (N.Y.Sup.Ct. 1979), *In Re McNulty*, No. 9190 (Probate Ct. Essex Co., Mass. Feb. 15, 1978), *Maine Medical Center* v. *Houle*, No. 74-145 (Super.Ct. Cumberland Co., Me. Feb. 14, 1974) (treatment ordered for multiple defects and blocked esophagus), *Muhlenberg Hosp.* v. *Patterson*, 128 N.J.Super. 498, 320 A.2d 518 (1974), *In re Teague*, No. 104-212-81886 (Cir.Ct. Baltimore, Md., filed Dec. 4, 1974) (spina bifida).

[17] *See, e.g., Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 431 (1977) ("[T]he value of life under the law (has) no relation to intelligence or social position."). *See also, Maine Med. Center* v. *Houle*, No. 74-145 (Super.Ct. Cumberland Co. Me. Feb. 14, 1974). "[T]here is no legal precedent" for the judgment that the quality of life affects its value. Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 Stan.L.Rev. 213, 237, 242 (1975).

The plain language of § 504 prohibits the failure to provide, solely by reason of handicap, medically-indicated treatment to handicapped infants who can benefit from such treatment. This plain language controls unless a clearly expressed, contrary legislative intent exists.

## III.

## THE LEGISLATIVE HISTORY COMPELS A BROAD APPLICATION OF § 504 TO PROSCRIBE THE DISCRIMINATORY TREATMENT OF HANDICAPPED INFANTS.

### A. The Legislative History Establishes That § 504 Is A Broad, Remedial Provision.

The legislative history of § 504 is nearly silent on the narrow question of providing medical treatment to handicapped infants. Nevertheless, the Rehabilitation Act, as enacted and amended, provides a wide range of research and services for the handicapped, with a priority for "severely handicapped" persons, including infants. Section 504, in turn, was intended to establish a comprehensive, federal policy prohibiting discrimination in *all* federally-assisted programs.[18] Both indicate that handicapped infants are among the persons covered by these laws.

The legislative proposals which became § 504 were jointly introduced in the House and Senate, separate from the Rehabilitation Act, in late 1971 and early 1972. Upon introducing H.R. 12154[19] in December 1971, Rep. Vanik referred to the growing number of handicapped individuals in the United States, including the yearly birth of 100,000 babies with "defects." In introducing S.3044 in January

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[18] *See generally*, R. Scotch, *From Good Will to Civil Rights* (1984).

[19] Entitled "A bill to amend the Civil Rights Act of 1964 in order to prohibit discrimination on the basis of physical or mental handicap in federally assisted programs." 117 Cong.Rec. 45974-75 (1971).

1972,[20] Senator Humphrey "focused [his] attention on the handicapped child," and referred to the variety of handicapped individuals including "the 100,000 babies born with defects each year." 118 Cong.Rec. 525-526 (1972). He stated that "[e]very child—gifted, normal, and handicapped—has a fundamental right to educational opportunity and the right to health." *Id.*[21]

In September, 1972, Senator Randolph, Chairman of the Senate Subcommittee on the Handicapped, introduced S. 3987, entitled the "Rehabilitation Act of 1972." *Id.* at 30680. The bill was introduced to replace the 50 year old Vocational Rehabilitation Act, the Smith-Fenn Act of 1920. *Id.* at

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[20] Entitled "A bill to amend the Civil Rights Act of 1964 in order to prohibit discrimination on the basis of physical or mental handicap in federally assisted programs."

[21] These statements by Vanik and Humphrey indicate that handicapped infants are among the persons covered by these bills. *See also* 118 Cong.Rec. 14244 (Statement of Rehabilitation Services Administration (RSA) Commissioner Edward Newman, including reference to infants with birth defects). Sen. Randolph noted:

> Of whom do we speak when we speak of the severely handicapped? . . . Do we have many such people, or are they few in number? . . . We all know of the progress that has been in the medical profession. We know of the improvements which have been made from the standpoint of prenatal and postnatal care, resulting in higher rates of survival among our multiple handicapped infants. The changing concept of the right to treatment, the advent of new drugs and new surgical techniques, permits lives previously lost to be saved. But patients are often left with physical or mental handicaps.
>
> Once we thought the lives of such people were a loss, that we could not return them to active levels of society where they would be productive citizens. Now, however, we know that that can be done. We know it has been done.

119 Cong.Rec. 10802. *See also* n.23 *infra*.

32279, 32304-305. A section 604, prohibiting "any kind of discrimination against handicapped individuals with respect to any program receiving Federal financial assistance," was included in Title VI of S. 3987. *Id.* at 30681, 32265, 37302.

President Nixon vetoed the corresponding House Bill, H.R. 8395, in October, 1972. The bill was reintroduced in the Senate as S. 7 in January, 1973, which was approved by the Senate in February, 1973, with the nondiscrimination provision included as § 705. 119 Cong.Rec. 5900-901, 5915 (1973). President Nixon vetoed S. 7 on March 27, 1973.[22]

The Rehabilitation Act was introduced for a third time in May, 1973. The House Bill, H.R. 8070, including the nondiscrimination provision, § 503, passed the House in June, 1973.[23] 119 Cong.Reg. 18127-28.

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[22] Appellees contend that the Presidential vetoes of 1972 and 1973, and the Congressional deletion of various programs, indicate an intention that the Act not include any "medical" programs. But those presidential vetoes were based on cost, duplication, and categorization of types of services, not on any concern with federal oversight of medical decisionmaking. 118 Cong.Rec. 3723, 119 Cong.Rec. 9597, 24570. In addition, the veto memoranda never referred to the nondiscrimination section.

[23] Immediately before the vote on the bill, Rep. Vanik noted that H.R. 8070 incorporated his original provision against discrimination. He stated that H.R. 8070 was just a small beginning and urged Congress to move ahead to provide more programs for the education of handicapped children. He suggested that HEW has "impounded funds, that were designated to help handicapped children." He condemned the practice of ancient Greece where "the people would take the handicapped newborn and leave them to die of exposure on the mountainside," asking whether "we are guilty of the same type of gross neglect in this country!" 119 Cong.Rec. 18137.

The Senate debated the new Senate bill S. 1875 in July, 1973. 119 Cong.Rec. 24550.[24] The prohibition on discrimination was included in its final form as § 504. *Id.* at 24562. President Nixon signed the Rehabilitation Act of 1973, P.L. 93-112, into law on September 26, 1973.[25]

Throughout the debates of the 92nd, 93rd, and 94th Congresses, the precise meaning of § 504, with exception for the statements of Rep. Vanik and Senator Humphrey, was almost never explained. Section 504 "was not discussed in any of the hearings held prior to the law's passage . . ."[26] Its language was described or quoted numerous times, without exception, in a very straightforward and absolute manner.[27]

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[24] On the same day that the Senate considered the Rehabilitation Act of 1973, July 18, 1973, S.J. Resolution 118 was proposed to establish a White House Conference on the Handicapped. 119 Cong.Rec. 24442. The joint resolution proposed that the federal government work with the states to develop programs that would, among other things, "provide[] educational, health and diagnostic services for all children early in life so that handicapped conditions may be discovered and treated early." S.J.Res. 18 was passed by the Senate on July 18, 1973 and incorporated into Title III of the Rehabilitation Act Amendments of 1974. 120 Cong.Rec. 30536, 34722 (1974).

[25] Throughout the debates on the House and Senate Bills which eventually formed the Rehabilitation Act of 1973, Rep. Vanik and Senator Humphrey emphasized repeatedly that the nondiscrimination sections in these bills incorporated the intent of their original bills to amend the Civil Rights Act of 1964. 118 Cong.Rec. 32310, 119 Cong.Rec. 635, 6144-45, 7114, 18137. The remarks "of the sponsor of the language ultimately enacted are an authoritative guide to the statute's construction" and should be accorded "substantial weight." *North Haven*, 456 U.S. at 526.

[26] Scotch, *supra* n.19, at 4.

[27] *See* 117 Cong.Rec. 45945 (1971); 118 Cong.Rec. 525, 526, 8399, 8894, 11797, 16371, 30681, 30682, 30683, 32280, 32281, 32282, 32294, 37302, 32310, 35155, 35163, 35837 (1972); 119 Cong.Rec.

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Nevertheless, Senator Cranston, Acting Chairman of the Senate Subcommittee on the Handicapped, said that § 504 was intended to deal "comprehensively" with discrimination. 119 Cong.Rec. 5862, 24569 (1973). This Court has noted that § 504 was consciously patterned after the broad provisions of Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000(d) (1982), *Alexander*, 105 S.Ct. at 718 n.13, *Darrone*, 104 S.Ct. at 1254 n.13.

In hindsight, it is apparent that Congress had no reason to specifically consider the medical treatment of handicapped infants in 1973: it simply was not a prominant social issue. The first medical article openly discussing the subject was published after the 1973 Act was signed into law. Duff & Campbell, *Moral and Ethical Dilemmas in the Special Care Nursery*, 289 N.Eng.J.Med. 890 (Oct. 25, 1973).[28] Duff and Campbell lifted the veil on "the public and professional silence on a major social taboo." *Id.* at 894. Congress' first hearings on the subject in 1974 were themselves "prompted" by the article. "Panel Told Defective Infants Are Allowed To Die," New York Times, June 12, 1974, at 18, col. 3, *Medical Ethics: The Right to Survival, 1974: Hearings Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare on Examination of the Moral and Ethical Problems Faced With the Agonizing Decisions of Life and Death*, 93d Cong., 2d Sess. 2 (1974).[29] Congress again held hearings on the subject in 1983.

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65, 5862, 5873, 5880, 5915, 6145, 7114, 7136, 7153, 18127, 24562, 24569, 24571, 24580-81, 24586-589, 29628, 29633 (1973).

[28] "Debates about the ethics of foregoing life-sustaining treatment for newborns began to appear in professional journals in the early 1970's." President's Commission at 198 n.4 (citing Duff and Campbell).

[29] This hearing was apparently merely investigative, designed to "focus public attention on these issues." Neither § 504, nor the Rehabilitation Act, was mentioned in the hearing.

S.Rep. No. 246, 98th Cong. 1st Sess. (1983), *reprinted in* [1984] U.S. Code Cong. & Adm. News 2981.[30]

It is the 1982 Infant Doe case which prompted the regulations before this Court, as well as the Child Abuse Act Amendments of 1984. P.L. 98-457. The 1984 Senate Report noted that "[t]he highly publicized recent cases have catapulted the issue of withholding treatment from seriously ill newborn infants into the public arena. . . ." S.Rep. No. 98-246, at 6.

The silence of the legislative history on the specific issue of the treatment of handicapped infants does not conclude the inquiry. Statutory interpretation is not a narrow process, tied only to the particular facts before the legislature, but is necessarily broader, since statutes look to the future. As this Court recently stated: "The fact that RICO has been applied to situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Sedima*, 105 S.Ct. at 3287. The judicial function is not to understand the past solely in its own terms, but to apply the values that the legislature adopted to new facts as they arise. It is for the judiciary to identify the sorts of evils against which the provision is directed and to apply it to their contemporary counterparts. "[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima*, 105 S.Ct. at 3285 n.13. When a regulatory application of a remedial statute falls within the broad sweep of the plain language and implements the purpose of the statute, the silence of the legislative history on the particular application cannot invalidate the regulation.

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[30] These hearings and the resulting Child Abuse Amendments of 1984, P.L. 98-457, 98 Stat. 1749, indicate, if anything, that the Child Abuse Amendments were intended to supplement the regulations at issue. *See* Brief of Amicus Curiae Hon. Orrin G. Hatch and Austin J. Murphy, Members of the Congress of the United States, in Support of Petitioner.

**B. The 1974 and 1978 Amendments Emphasize that The Rehabilitation Act Encompasses Handicapped Infants and Medical Services.**

In enacting the 1974 Amendments to the Rehabilitation Act, Congress recognized that the emphasis on employment in the definition of "handicapped individual" in the 1973 Act, 29 U.S.C. § 706(7), conflicted with the broader intent for § 504, which was not to be "limited to employment" or to "the individual's potential benefit from vocational rehabilitation services." 120 Cong.Rec. 30534, 35009.[31] The Senate and Conference Reports on the 1974 Amendments specifically stated (1) that the amended definition of "handicapped individual" was intended to reflect a prior broader intent in § 504 and to encompass discrimination in a broad range of services, in addition to employment, (2) that § 504 "was enacted to prevent discrimination" in "health services," (3) that § 504 was expressly patterned after Title VI and Title IX, and (4) that discrimination on the basis of handicap was analogous to discrimination for race or sex, because "handicapped persons" are discriminated against "when they are, in fact, handicapped (this is similar to discrimination because of race or sex) and because they are classified or labeled, correctly or incorrectly, as handicapped . . . " S.Rep. No. 93-1297, at 37-40, 120 Cong.Rec. 30534, 34725, 35010, 35016. Congress consciously compared handicap discrimination to racial and sexual discrimination. For the court of appeals to reject this analogy "is an outright disagreement with Congress' judgment and an unconstitutional act in itself." 729 F.2d at 163 (Winter, J., dissenting).[32]

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[31] The 1974 Amendments added the first sentence of subparagraph (B) to section 6(7) of the Act. P.L. 93-516, 88 Stat. 1617 (1974). *See supra* n.2.

[32] When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who

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The Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, P.L. 95-602, 29 Stat. 2955 (1978 Amendments), amended the Rehabilitation Act of 1973 in three relevant areas. First, a new section provided attorney's fees for "prevailing plaintiffs" under § 504. 29 U.S.C. § 794(a)(b) (1982). Second, the "remedies, procedures and rights set forth in [T]itle VI" were made available to any person discriminated against under § 504. 29 U.S.C. § 794(a)(2) (1982). Both of these amendments indicate that § 504 was intended to serve handicapped persons as a full civil rights remedy, similar to Title VI, regarding race discrimination, and to Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681 (1982), regarding sex discrimination.

Finally, and most importantly, the 1978 Amendments created a model demonstration program for severely handicapped children, aged 0-5 years. 29 U.S.C. § 796 (1982). This is included within Title VII, governing "comprehensive services for independent living." *Id.* Title VII authorizes grants to assist states in providing "services for children of preschool age." 29 U.S.C. § 796a, 762(b)(11) (1982). The model program[33] is directed to "multiple handicapped" children who "require a full range of health-related services."

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> have no constituency—have a duty to respect legitimate policy choices made by those who do.
>
> *Chevron*, 104 S.Ct. at 2793.

[33]The bill shifted the authority for the program to the National Institute of Handicapped Research (NIHR). 29 U.S.C. § 761a. The NIHR provides grants for research and training in pediatric rehabilitation, rehabilitation and developmental care of very low birth weight infants, intervention for high risk and handicapping conditions for children up to age 3, early intervention with risk and handicapped infants, and parental decisionmaking in the treatment of newborns with disabilities. U.S. Dept. of Education, NIHR, *Program Directory* (1985)

124 Cong.Rec. 30308. The services include "infant and preschool services, such as early intervention, parent training and counseling, infant stimulation, and early identification, diagnosis and evaluation." S.Rep. No. 890, 95th Cong., 2d Sess. 25 (1978). It was expected that these services "would be attached to children's hospitals or similar facilities." *Id.* at 29.[34]

"Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting* v. *FCC*, 395 U.S. 637, 380-81 n.8 (1969). "[W]hile the views of subsequent Congresses cannot override the unmistakeable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." *SeaTrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980).[35] The 1973 Act, the 1974 Amendments, and the 1978 Amendments are *in para materia* and "are to be taken together, as if they were one law." *United States* v. *Stewart*, 311 U.S. 60, 64 (1940), *United States* v. *Freeman*, 44 U.S. (3 How.) 556, 564 (1845).

Since Congress specifically created a model program to meet the individual medical needs of multiple handicapped infants, regulations which prohibit the denial of medically indicated treatment to such infants in federally assisted programs are reasonably related to the enabling legislation. As originally enacted, and as a part of the amended Rehabilitation Act, § 504 provides statutory authority for

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[34] "The physical and developmental problems of these infants and young children are often life-threatening to the extent that skilled management is essential. Care for the physical development of these children must take precedence over the development of educational, treatment or developmental programs." S.Rep.No. 890, at 28. Included among these model services is pediatric care. 29 U.S.C. § 762(b)(11).

[35] This Court has previously given deference to the 1974 debates and Congressional Reports as an explanation of the scope of § 504. *Alexander*, 105 at 722-23 n.24.

these regulations. Certainly, no clearly expressed, contrary legislative intent exists.

## IV.

## THESE REGULATIONS ARE ENTITLED TO DEFERENCE BECAUSE CONGRESS DELEGATED SUBSTANTIAL AUTHORITY TO THE AGENCY.

This Court normally accords great deference to the interpretation of the agency charged with the statute's administration. *North Haven*, 456 U.S. at 521 n.12. Where "Congress has conferred broad discretion on an agency" to implement the statute, a court must accept the agency's interpretation unless it is "manifestly unreasonable." *American Maritime Ass'n* v. *United States*, 766 F.2d 545, 560 (D.C.Cir. 1985). If the statute is silent on the precise issue, the agency's interpretation controls "unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2783 (1984). Despite Congress's delegation of substantial authority to HHS, the court of appeals held that the regulations at issue were not entitled to deference because there was no "longstanding consistent interpretation." 729 F.2d at 154. A thorough understanding of the regulatory history, however, demonstrates that the Secretary's rulemaking has been consistent in all respects relevant to the treatment of handicapped infants.

Since 1977, the regulations under § 504 have consistently prohibited discrimination by health care providers. 45 C.F.R. Pt. 84 App. A, Subpart F (1977). The regulations at issue originated in a "Notice to Health Care Providers." 47 Fed.Reg. 26027 (1982). The Interim Final Rule, published on March 7, 1983, did "not in any way change the substantive obligations of health care providers" but applied the Title VI procedural regulations to the context of medical treatment of

handicapped infants. 48 Fed.Reg. 9630 (1983).[36] The United States District Court for the District of Columbia struck down the Interim Final Rule under the Administrative Procedure Act, 15 U.S.C. 706(2)(A). *American Academy of Pediatrics* v. *Heckler*, 594 F.Supp. 69 (D.D.C. 1983). Subsequently, the Secretary again published proposed rules on July 5, 1983. 48 Fed.Reg. 30846 (1983). A Final Regulation, issued on January 12, 1984, contained two primary changes, based upon consideration of the 17,000 comments received: (1) The Report encouraged, but did not require, hospitals to establish Infant Care Review Committees, (2) the Report required the posting of signs, following Title VI guidelines, but altered their size and location. 49 Fed.Reg. 1622 (1984) (to be codified at 45 C.F.R. Pt. 84).[37] Both the proposed and final rules stipulated that "impossible or futile acts or therapies" were not required and recognized the priority of reasonable medical decision-making. 48 Fed.Reg. 30846-47, 49 Fed.Reg. 1622. The basic principles established in the 1977 regulations, and drawn from the Title VI regulations, were applied to the treatment of handicapped newborns.

The original Notice of Intent to issue proposed rules (NIPRM) of May 1976, 41 Fed.Reg. 20296, and the subsequent Notice of Proposed Rulemaking (NPRM) of July 1976, 41 Fed.Red. 29548, do not demonstrate that HEW had a "limited view" of the scope of § 504 which excluded medical treatment. The NIPRM concerned "[involuntarily institutionalized patients] rights to receive or refuse treatment." 41 Fed.Reg. 20297, 29559 (1976). The subsequent NPRM noted that "[s]everal commentators suggested that the regulation should cover these areas and several others noted that the

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[36] The § 504 regulations previously incorporated the Title VI procedural regulations. 45 C.F.R. § 84, Subpart G (1977).

[37] Although the court of appeals viewed these changes as an inconsistency, "[a]n initial agency interpretation is not instantly carved in stone." *Chevron*, 104 S.Ct. at 2792.

Department did not have authority to regulate in this area under section 504." *Id.* The Department concluded:

> The proposed regulation takes the same position as the draft regulation appended to the May 17 notice; i.e., there are no provisions concerning adequate and appropriate psychiatric care or safe and humane living conditions for persons institutionalized because of handicap . . . The Secretary is of the opinion that to promulgate rules on these subjects is beyond the authority of section 504.

*Id.*

The Department's position in that context has little in common with the present regulations. First, regulations requiring affirmative habilitative, psychiatric, or therapeutic treatment are substantively different from regulations prohibiting discrimination against handicapped infants. The Secretary accordingly distinguished the 1977 position in promulgating the current regulations. 49 Fed.Reg. 1636 (1984). Second, HEW could reasonably conclude that § 504 did not mandate a right to affirmative treatment of institutionalized persons because, by its nature, § 504 requires equal treatment of similarly situated handicapped and nonhandicapped persons. In the case of institutionalized persons, it is difficult to identify nonhandicapped persons with whom a comparative analysis can be made. But in the case of handicapped infants, a meaningful medical comparison can be made with nonhandicapped infants regarding the provision of beneficial treatment. *See* Gerry, *The Civil Rights of Handicapped Infants: An Oklahoma 'Experiment,'* 1 Issues in Law & Medicine 15, 48-50 (1985).[38] Accordingly, HEW's conclusion

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[38] Even if the situations are analogous, this Court has held that institutionalized persons *have* a right to medical treatment. *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). The state "conced[ed] that [Romeo] [had] a right to adequate food, shelter, clothing, and medical care" and this Court concluded that Romeo had a right to safe conditions, freedom from bodily restraint, and

*(footnote continued on next page)*

that § 504 did not mandate affirmative habilitative or psychiatic care for institutionalized persons is simply irrelevant to the issue of the authority under § 504 to proscribe intentional discrimination in the failure to provide medically-indicated treatment to handicapped newborns. It was erroneous, therefore, for the court of appeals to conclude that HEW's position established a "limited" view of § 504 that in any sense reflects upon the present regulations.[39] In addition, the court of appeals failed to understand the purpose of HEW's conclusion that the regulation would not "require specialized hospitals and other health care providers to treat all handicapped persons." 729 F.2d at 152. By this, HEW meant that a health service provider would not have to provide treatment to handicapped persons if it did not provide such treatment to nonhandicapped persons, or did not

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*(footnote continued from preceding page)*

"minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 315-319. This Court held that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for courts to specify which of several professionally acceptable choices should have been made." *Id.* at 321. Nevertheless, it is implicit that, if Romeo had a right to adequate food, shelter, clothing, medical care, etc., then "professional judgment" or "professionally acceptable choices" could not include denying these basic rights.

[39] The court also concluded that these regulations were contradicted by § 1395 of the Medicare Act and § 1320(c) of the Social Security Act (PSRO), passed prior to § 504. 729 F.2d at 160. These statutes, however, are not *in para materia*. They cannot be construed together because they do not concern the same subject matter, *United States* v. *Stewart*, 311 U.S. 60, 64 (1940), or have the same purpose, *Erlenbaugh* v. *United States*, 409 U.S. 239, 245-46 (1972), and were not enacted in the same time period, much less simultaneously. *Dickerson* v. *New Banner Institute, Inc.*, 103 S.Ct. 986, 994 (1983). They have neither similar language, *Oscar Mayer Co.* v. *Evans*, 441 U.S. 750 (1979), nor identical coverage, *Tooahnippah (Goombi)* v. *Hickel*, 397 U.S. 598, 606 (1970).

have the proper facilities, but if it provided a type of treatment to nonhandicapped persons, it could not refuse such treatment to handicapped persons. Thus, for example, the burn center cannot "refuse to treat the burns of a deaf person because of his or her deafness." 45 C.F.R. Pt. 84, App. A, Subpart F, ¶ 36 (1977).

In addition, although the court noted that the proposed version of the 1977 regulations "emphasized the availability of services," 729 F.2d 152 (citing 41 Fed.Reg. 29567 (1976)), it failed to note that the proposed rules equally emphasized the "level of services."[40] In concluding that HHS had made a "shift in agency policy" by promulgating the present "novel and far-reaching regulations, the court ignored the fact that HHS, under the Carter Administration, had taken the same position. Pet. for Cert. at 24, 48 Fed.Reg. 30847-48 (1983). *See Protection and Advocacy Agency of Hawaii* v. *Kapiolani Children's Hospital*, Health and Human Services Doc. No. 09-79-3158 (1980).[41]

These regulations, like prior regulations promulgated under § 504, are entitled to substantial deference. *Alexander*, 105 S.Ct. at 722 n.24. The 1974 Amendments emphasized that the responsibility for regulations was delegated to

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[40] "All health services shall be provided to handicapped persons at least to the same extent that they are provided to nonhandicapped persons and shall be provided in such manner as is necessary to afford handicapped persons equal opportunity to benefit from these services." 41 Fed.Reg. 29567 (1976).

[41] In *Chevron*, this Court upheld regulations where the legislative history was "silent on the precise issue," 104 S.Ct. at 2792, the agency had changed its interpretation of the statutory term, *Id.*, and the current administration had reversed the previous administrative interpretation, *Id.*, at 2789, because the current interpretation was consistent with the legislative policy concerns and Congress had delegated substantial authority. Here, the regulations are also consistent with policy concerns and the current regulations emphasize a position adopted by an earlier administration.

HEW. S.Rep. No. 1297, at 39-40.[42] The 1974 Amendments "clarified the scope of § 504 by making clear that those charged with administering the Act had substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination." *Alexander*, 105 S.Ct. at 722-23 n.24. Furthermore, the 1978 Amendments were intended to codify the regulations enforcing § 504. *Id.*, *Darrone*, 104 S.Ct. at 1254-55 n.15-16.

Since Congress intended § 504 to establish a comprehensive, federal policy of nondiscrimination, Congress did not expect § 504 to be dependent on state law. *Cf. North Dakota*, 103 S.Ct. at 1104, *Dickerson*, 103 S.Ct. at 995, *NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600, 603 (1971). Congress evidently showed that it expected HEW to administer regulations under § 504 with the same authority that it does so under Title VI. *Cf. Lau* v. *Nichols*, 414 U.S. 563, 569 (1974). The regulations at issue should likewise be accorded substantial deference.

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[42] After noting that 504 was "patterned after" Title VI and "therefore constitut[ed] the establishment of a broad governmental policy against handicap discrimination," the 1974 Senate Report stated that 504 "does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended." The language of 504 "envisions the implementation of a compliance program which is similar to [Titles VI and IX], including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance...." Congress intended that 504 "be administered in such a manner that *a consistent, uniform and effective Federal approach* to discrimination against handicapped persons would result," and gave the Secretary of HEW "responsibility for coordinating the section 504 enforcement effort...." S.Rep.No. 1297, at 39-40 (emphasis added).

## V.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals below should be reversed.

Respectfully submitted,

*Dennis J. Horan
Victor G. Rosenblum
Edward R. Grant
Maura K. Quinlan
Clarke D. Forsythe
Americans United for Life
Legal Defense Fund
343 S. Dearborn St.
No. 1804
Chicago, Illinois 60604
(312) 786-9494

*Counsel for Amici*

* Counsel of Record.